

JUDGING INTERNATIONAL CRIMINAL LAW CASES

A PANEL DISCUSSION WITH LEADING INTERNATIONAL CRIMINAL LAW JUDGES

Convened by the Hauser Global Law School Program together with
the Institute for International Law and Justice, NYU Law School

featuring

Judge George Gelaga King, President of the Special Court of Sierra Leone
Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia
Judge Meddzida Kreso, President of the State Court of Bosnia and Herzegovina
Judge Philippe Kirsch, President of the International Criminal Court

Moderated by Professor Richard Stewart, Director, Hauser Global Law School Program

Lester Pollack Colloquium Room | Thursday, March 6, 2008

REPORT

The session, in which 80-100 NYU Law School students participated, consisted principally of the judges responding to questions asked by students. The organizers and the student attendees expressed their deep appreciation to the judges for taking part, and to NYU Law Professor Theodor Meron, Judge of the ICTY, for his support. The following Report, prepared by IILJ Program Officer Surabhi Ranganathan, summarizes major themes of the discussion. It is not an accurate transcript, nor a text approved by any of the participants, merely a summary of topics covered. The session began with brief presentations by each judge:

Initial Remarks from the Judges on the Challenges faced by their Courts

JUDGE POCAR mentioned three problems. First, as the earliest Tribunal to be established by the Security Council, the ICTY was given little guidance on the substantive elements of crimes under international law. The statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is quite short and provides few details. The judges were told to apply customary international law to flesh out the provisions of the statute. This was no easy task as there was little international consensus on most of the issues. Second, the tribunal was not provided with rules of procedure; it was expected that the judges would establish these. Again, this was easier said than done, for the judges belonged to different legal systems, and were used to following fairly diverse procedures. Third, the tribunal had to balance competing aims of concluding cases expeditiously, and ensuring that in each case a fair trial was accorded to the accused.

JUDGE KING adverted to several other challenges faced by the Special Court of Sierra Leone (SCSL) later in the discussion. In his initial presentation he explained the structure of the court, a hybrid including domestic and international judges. He also referred to the several high profile cases on the docket of the Court, including the trial of Charles Taylor, former President of Liberia. Taylor will be tried by the SCSL, but at The Hague, not in Freetown, Sierra Leone, where the Court is located.

JUDGE KIRSCH mentioned the following issues with respect to the International Criminal Court. First, as the Court is created by treaty and not by a [Chapter VII] Security Council Resolution, it

cannot count on the support of the Security Council and the international community. Second, the cases thus far referred to the Court arise from areas (Democratic Republic of Congo, Uganda, Central African Republic and Sudan) that are sites of continuing armed conflict; international crimes are being committed even in the present. Third, the ICC statute includes several new structural and procedural elements, such as allowing victims to participate even if they are not willing to appear as witnesses. The Court has to establish fresh working procedures to give effect to these elements.

JUDGE KRESO outlined the structure of the State Court of Bosnia and Herzegovina (SCBH), which like the SCSL is also a hybrid, with both domestic and international judges. However, the international judges are to be replaced by domestic judges by 2009. The Court can try domestic and international crimes. It faces two prominent challenges. The first is of operating within a combined system of continental law and adversarial law, and reconciling the two. After much effort the Court has been able to lay down operating procedures which meet with international standards. The second is of dealing with the huge volume of cases that must be brought to closure soon, as time is running out both for victims and witnesses. The fact that international judges are expected to exit the Court by 2009 creates additional pressure to resolve cases as early as possible.

Themes discussed in the Question-Answer Session

Fair trial to the accused

One major challenge faced by all of the courts is to ensure fair trial to the accused. As mentioned before, in some cases, like the Taylor trial, this has required the court to move the location of the trial to another city or state.

In other instances, the concern is to provide the accused with competent defense counsel if they are unable to appoint their own. Judge Pocar stated that this had proved to be a difficult question for the ICTY. Initially, it had been decided that the Registrar would appoint the Counsel, but the Tribunal was soon swamped by pleas for legal aid. The Tribunal therefore had to develop a special legal aid program to identify and offer assistance to indigent defendants. The Tribunal also has to ensure that the court-appointed counsel responsibly discharge their duties to the defendants.

A third issue is the rate of delivery of justice. Judge Pocar highlighted the slow trial rates in most international courts. Quoting William Gladstone, “justice delayed is justice denied”, he asserted that this was contrary to due process, which demands expeditious delivery of justice. He referred in particular to the delays at the ICTY, noting that one reason for such delays is that the defendants are often accused on multiple counts (sometimes as many as 70 different counts) and are required to be tried for each – the intention being to create a historical record. But, the job of the court is not to write history; in most cases it is enough to try the accused on a few counts only.

Finally, is the accused entitled to reparation, if acquitted of all crimes? Judges Pocar stated that the ICTY statute was silent on this issue. And, while the UN should consider the issue, it must be remembered that in most domestic jurisdictions the acquitted do not receive compensation. At the same time he referred to a case where there was tremendous delay in commencing the trial: the court decided that in case the defendant was convicted, the period he spent in custody would be taken into account in sentencing, whereas if he was acquitted, he would be granted compensation.

“Justice”, “Reconciliation”

In an interesting series of questions, the judges were asked: what should be the main objective for the international community in the aftermath of a conflict, punishment to perpetrators or reconciliation between parties to the conflict? Are the two goals mutually incompatible, such that we must choose one over the other? And, in this context, what has been the relationship of international tribunals with the Truth and Reconciliation Commissions [TRCs] that have been established in several regions of conflict.

All the judges stressed that justice and reconciliation were not incompatible goals. Judge Kreso stated that it was important that priority must be given to bringing criminals to justice, as we owe this to the victims. She further explained that it was important to hold trials in the country where the crimes were actually committed, for this facilitates reconciliation.

Judge King also noted that though the Lomé Agreement provided for amnesty to the parties to the conflict in Sierra Leone, this was not a bar to their prosecution for international crimes. It is important that such crimes do not remain unpunished, for reconciliation is built on bringing to justice those who have committed atrocities. To this end the Sierra Leone TRC worked in accord with the Special Court.

Judge Pocar pointed out that in most cases it was not possible for international tribunals to deal with the immense number of crimes committed during international conflicts; usually only the leaders were brought to trial. TRCs thus had an important supporting role to play in addressing the other cases.

Judge Kirsch noted that in some cases it would appear that goals of peace and justice would demand different courses of action, but lasting peace cannot be achieved without justice. It is therefore important to reconcile the two ends as far as possible. He took the example of Uganda where provisions for individual accountability have been built into the accord for post-conflict reconciliation. He also stressed upon the need to focus upon measures for protection and rehabilitation of victims.

Protection and Rehabilitation of Victims

A related set of questions enquired what measures were taken by the courts for the benefit of the victims of international crimes.

Judge Kreso referred to the right to the victims to have perpetrators brought to justice. She outlined several provisions made by the State Court to assist victims including a special department that offers support to victims of torture, psychological counseling to victims, travel assistance to appear before the court and the possibility of taking anonymous testimony where necessary for the safety of the victim. Judge Kirsch agreed on the importance of such measures and noted that the ICC has also made similar provisions for victims.

The judges also agreed upon the importance of outreach programs that are now a feature of most international courts. Judge Kirsch stated that the ICC has set up field offices in each of the areas referred to the court in order to contact people and provide them with information about the Court and its activities. This is important also because the ICC deals with the main perpetrators – and not every person who may be accused of crime. The outreach program conveys the court’s concern for other victims, and disseminates information about activities that are considered criminal by the Court. This may help to reduce the number of crimes committed in these areas, most of which, as noted before, are sites of continuing conflict.

Individual responsibility v. State responsibility

The judges, though approving of the development of forums for prosecution of individual perpetrators, cautioned that such forums should not obscure the accountability of the state. In several cases, the accused are indigent and dependant upon the court for their defense; thus hardly able to offer reparations to the victims. The wrongdoer state must therefore provide for the victims. In this context, Judge Pocar suggested that one criticism of the recent judgment of the International Court of Justice in the *Genocide case* was that: having affirmed Serbia's responsibility for genocide, it did not order Serbia to make reparations to the victims.

The crime of "aggression" in trials for individual responsibility

Aggression was included as a crime in the ICC statute due to immense international impetus. However, the Court is not necessarily an appropriate forum to try this crime. In any event, given that there is no agreement on what constitutes aggression, nor on the role of the Security Council in determining when acts of aggression have occurred, the ICC has no responsibility to indict individuals for this crime. It was understood that the Security Council would have the responsibility to decide when aggression had occurred, but the Council has not been consistent in declaring aggression, and has often omitted to label violent actions as acts of aggression.

Problems of hybrid courts

SCBH and SCSL are both hybrid courts, and as such face special challenges including interference from local bodies as well as the international community. For instance, the funding of the SCSL comes from a handful of powerful states, which therefore inevitably have a say in its functioning. On the other hand, the State Court of Bosnia is under immense pressure from local politicians, some of whom had been involved in war crimes and are thus not supportive of the Court's work. Such local and international pressures could be avoided by: providing such courts with independent sources of funding, strong outreach programs, support from the international community and independent procedures for appointing judges.